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2017/04318/A1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 30th October 2018

B e f o r e:
LORD JUSTICE GROSS

MR JUSTICE MARTIN SPENCER

and

HIS HONOUR JUDGE KATZ QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

RHYAN ALEXANDER THOMAS

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Mr C J W Smyth appeared on behalf of the Appellant

Mr K Barker appeared on behalf of the Crown

J U D G M E N T
(Approved)

Tuesday 30th October 2018

LORD JUSTICE GROSS: I shall ask Mr Justice Martin Spencer to give the judgment of the court.

MR JUSTICE MARTIN SPENCER:

1. This is a case to which the provisions of the Sexual Offences (Amendment) Act 1992 apply. No matter relating to the victims of these offences shall during their lifetime be included in any publication if it is likely to lead members of the public to identify those persons as victims of these offences. This prohibition shall apply unless waived or lifted in accordance with section 3 of the 1992 Act.

2. On 7th September 2017, in the Crown Court at Swindon, the appellant was sentenced to a determinate sentence of seven years' imprisonment, followed by a consecutive extended sentence of thirteen and a half years, comprising a custodial element of eleven and a half years and a period of extended licence of two years. In addition, a Sexual Harm Prevention Order was made under section 103 of the Sexual Offences Act 2003 until further order, and a restraining order was made under section 5 of the Protection from Harassment Act 1997 until further order.

3. The appellant appeals against sentence by limited leave of the single judge.

4. The facts of this matter were as follows. On 17th October 2016, TH, who was then 18 years of age, contacted the police and stated that she had been in a sexual relationship with the appellant which had started when she was 15 years old. The appellant would have known her age because TH was a friend of the appellant's sister. The sexual activity involved the penetration of TH's mouth and vagina by the appellant with his penis. That constituted counts 2 and 3 of the indictment (Sexual activity with a child, contrary to section 9(1) and (2) of the Sexual Offences Act 2003).

5. TH had tried to bring the relationship to an end, but the appellant refused to allow that. He stated that the relationship would not stop, that he would not let her go and that she was his. The appellant threatened to smash her mother's car and smash her windows if TH told anyone about the relationship. The appellant turned up at the family home on occasions at 4am and made so much noise that TH felt compelled to go with the appellant in order to stop him disturbing her family. The appellant tried to prevent TH from communicating with others. He smashed her phone on two occasions. He spat and projected snot at her and on one occasion urinated on her. The appellant assaulted TH, causing her to wet herself on one occasion. There was also considerable telephone data evidence which further demonstrated his coercive and controlling behaviour toward TH. As part of that controlling and coercive behaviour, the appellant had threatened to damage the property of TH and members of her family. This constituted count 1 on the indictment (Controlling or coercive behaviour in an intimate relationship, contrary to section 76(1) and (11) of the Serious Crime Act 2015).

6. The appellant was arrested and in October 2016 he was remanded in custody. While he was in custody, he arranged for numerous messages to be sent to TH asking how much money it would take for TH not to go to court and to withdraw her evidence. That was count 9 of the indictment (conspiracy to do acts tending and intended to pervert the course of public justice, contrary to common law).

7. On 25th October 2016, the police interviewed a further complainant, DS. She informed the police that she had begun a sexual relationship with the appellant when she had been 15 years of age. She did not tell the appellant her age and the appellant never asked. She informed the police that the appellant had made threats towards their unborn child, she having fallen pregnant by him, and had threatened to damage DS's mother's car. The appellant was arrested and bailed.

8. On the same day that the appellant was bailed, someone threw a rock through the window of the house of DS's mother and smashed the windows of the mother's car.

9. There was a great deal of telephone evidence of the appellant's controlling behaviour towards DS and of his harassing conduct towards her.

10. A police investigation failed to discover the identity of the offender who caused the damage to the property of DS's mother, but the pattern had been such that a proper inference could be drawn that the damage was caused by or at the instigation of the appellant. This was count 7 of the indictment (Putting a person in fear of violence, contrary to section 4 of the Protection from Harassment Act 1997).

11. CP was a prospective witness in the ongoing investigations in relation to the appellant. On 12th November 2016 a brick was thrown through the window of a house, narrowly missing a baby who had been asleep in a crib at the time. That house had been mistaken for the home of CP's mother who resided in the same street. Similar damage was caused to CP's maternal grand-mother's home. Mobile phone and cell-site evidence, including locations where the appellant was held on remand, was obtained by the police. Both the appellant and his sister were charged with the offence of conspiracy to commit criminal damage, contrary to common law (count 8).

12. A further complainant, SN, was interviewed by the police on 14th February 2017. SN told the police that she had met the appellant through Facebook when she had been 13 years of age and had had vaginal sexual intercourse with him. That was count 10 of the indictment (Sexual activity with a child, contrary to section 9(1) and 9(2) of the Sexual Offences Act 2003). The appellant would have known SN's age because it had been made clear on her Facebook profile. When SN had tried to end the relationship, she too had been subjected to constant harassment and intimidation by the appellant.

13. In a Victim Personal Statement, TH indicated the effects of the appellant's controlling behaviour on her. They were psychologically extreme. At one point, she came very close to taking her own life. As the learned judge said, what should have been some of the happiest years of her life became a complete misery. She felt that she had been subjected to humiliation and degradation, which was what the appellant had wanted to achieve. She said that, psychologically, she still bears the scars and will do so for many years. The judge found that the effect of the appellant's behaviour on her might never disappear completely, and its effects had affected more than just TH. The judge said that he also took into account the effect on her family.

14. The relationship with DS mirrored that with TH in many ways. In his sentencing remarks the learned judge said this:

> "You sought to cause her fear of violence as much as you could, and of course it is the fear of violence that you have created, rather than any particular violence in itself, that you have pleaded guilty to and for which you must be punished. But again, so far as she is concerned, your behaviour was sustained and persistent, and I have read what she says about the effect upon her. In many ways, what she says mirrors what [TH] says. She was completely overborne by you. She is the mother of your child, and I bear very much in mind what I have heard about your reaction to her becoming pregnant and how you behaved during

her pregnancy."

15. As we have said, SN was only 13 years of age when the appellant began a sexual relationship with her. The learned judge said:

> "This is another relationship characterised by your violence, lack of respect, aggression, abuse and intimidation, and it seems to me that you show no sign at all of understanding the feelings of any of the three partners that you abused."

16. The learned sentencing judge found that the appellant was dangerous in relation to the specified offences under the Sexual Offences Act 2003. The sentence imposed was structured in such a way that for the offences in relation to counts 1, 2 and 3 on the indictment, the learned judge aggregated the terms of imprisonment so as to reach a sentence which he considered to be appropriate to reflect the seriousness of the overall offending for those offences. He then attributed the aggregate sentence to one of those counts, namely count 2.

17. The sentences in relation to counts 1, 2 and 3 were individually, after a one-third discount to reflect credit for the pleas of guilty, two and a half years, four and a half years, and four and a half years respectively – a total of eleven and a half years' imprisonment, to which was added an extended licence period of two years, making the total of thirteen and a half years imposed in relation to count 2.

18. That extended sentence was ordered to be served consecutively to a determinate term imposed for the other offences. The determinate term of seven years' imprisonment comprised two and a half years for the offence charged in count 7 and a consecutive term of four and a half years on count 10, together with concurrent sentences of three years' imprisonment on each of counts 8 and 9. Thus, the custodial sentence imposed was one of eighteen and a half years, with a two year extension.

19. On behalf of the appellant, in a conspicuously clear and coherent Advice on Appeal which was supplemented today by equally clear and coherent oral submissions, Mr Smyth argues that there was no adequate basis upon which the judge could find that the appellant was dangerous and that the overall sentence was not just manifestly excessive, but, as he said, outside the parameters of normal sentencing for offending of the kind in question. He points out that if full credit for the guilty plea has in fact been given, then the sentences are equivalent to a total custodial term of almost 28 years' imprisonment after trial, which he argues goes to emphasise that, in reality, no proper credit for the guilty plea has been given and there has been no proper regard to the principle of totality.

20. In addition, Mr Smyth argues that the Sexual Harm Prevention Order is in large part unnecessary, that it is disproportionate and, in some respects, insufficiently precise.

21. For the respondent, Mr Barker, to whom we are grateful for attending at short notice and who represented the Crown in the court below, argues that the court should look at these offences in the context of seriously manipulative relationships. He points to the actions of the appellant in turning up, for example, at 4am, demanding sex with TH and taking steps to prevent disclosure, which has led to psychological harm. He submits that the judge was right to regard these as serious offences and was right to categorise the appellant as dangerous. He submits that concurrent sentences were not appropriate because of the perversion of the course of public justice and that the learned judge was right to mark the separate nature of those offences by the imposition of consecutive sentences and for that reason he structured the sentence in the way

that he did, following the determinate sentence with the extended sentence.

22. Mr Barker referred the judge to *R v Joyce and Pinnell* [2010] EWCA Crim 2848, in which the Court of Appeal Criminal Division endorsed the procedure whereby the court can follow a determinate sentence with a consecutive extended sentence. It was in the light of that referral by Mr Barker that the judge structured the sentence in the way that he did.

23. Despite the eloquence of Mr Smyth's submissions, we disagree with his arguments in relation to dangerousness. However, we do agree that the overall sentence was too long and manifestly excessive for these offences and, furthermore, that the Sexual Harm Prevention Order should be significantly curtailed.

24. Starting with the finding of dangerousness, we agree with the learned judge's assessment where he said:

> "It is quite clear to me that the public need to be protected from you. These offences, your antecedents and everything I have heard about you quite obviously establishes that there is a significant risk of your causing serious psychological harm to others either by sexual abuse or violence or both".

25. We regard as artificial the way in which Mr Smyth has sought to distinguish the offences in relation to the counts other than the specified counts and to draw that distinction for the purposes of section 229 of the Act. In our view, his submission is wrong in relation to the suggestion that the reference to such specified offences is by reference to those charged, as opposed to others. In our view, that judge was right to have regard to the risk of the appellant committing other specified offences in the future and he was entitled to use the specified offences as (in the words of Mr Smyth) a “tag".

26. From all that we have heard and read about the appellant, we regard his behaviour as such as fully to merit the finding of dangerousness which the judge made and therefore to justify an extended sentence. In our view, this is a man who preys on underage girls significantly younger than himself and then uses intimidation, sexual abuse and violence on them. The age disparity between him and the victims – for example, the age disparity of over ten years between SN, who was only 13, and the appellant, who is in his mid-twenties, is more than a sufficient disparity to justify the finding of dangerousness.

27. However, we agree that the overall period of custody was too long and outside the usual parameters for this type of offending. We also agree that, although the structure of the sentence was generally appropriate, in making the sentences in relation to the harassment of SN consecutive to each other and to those in relation to TH, passing a determinate sentence, followed by the extended sentence, the sentencing judge failed to take sufficient account of the principle of totality in relation to the overall sentence passed.

28. Although we could have adopted the same sentencing structure as the learned sentencing judge did, we consider that the simpler and more straightforward approach is to take one single extended sentence for one of the specified offences on an aggregated basis. Like the sentencing judge, we take count 2 for that purposes and make all the other sentences concurrent.

29. The sentence on count 2 will remain at thirteen and a half years, of which the custodial element will be eleven and a half years and the period of extended licence two years. The other sentences will all remain the same, but will be concurrent with each other and concurrent with

the sentence on count 2. This reduces the custodial element of the sentence from eighteen and a half years to eleven and a half years. In our view, this sentence adequately reflects the totality of the offending. In substituting this sentence, we wish to emphasise that, normally, an offence of conspiracy to pervert the course of justice would in principle merit a consecutive sentence, as was imposed by the learned judge. The course which we have taken in this case should not be regarded as derogating in any way from that principle.

30. We turn to the Sexual Harm Prevention Order. The terms of the SHPO imposed were as follows:

> "a) The defendant shall not allow any child under the age of 16 years to enter and / or remain at his place of dwelling being the address at which the defendant resides unless the parent or legal guardian of that child is aware of the defendants' previous convictions and is present at all times
> b) The defendant shall not approach, engage in conversation or associate with, either by himself or through a third party, or by any means whatsoever, including by use of the internet, any female child under the age of 16 years, unless the parent or legal guardian of that child is aware of the defendant's previous convictions and is present at all times and the parent or legal guardian themselves has not been convicted of a sexual offence or an offence of violence.
> c) The defendant shall not undertake any activity or employment (either voluntary or paid) where a female child under the age of 16 years is also engaged in that activity or employment.
> d) The defendant shall not use any device capable of accessing the internet unless (i) it has the capacity to retain and display the history of internet use and (ii) he makes the device available for inspection on request by a police officer.
> e) The Defendant is prohibited from deleting the history of internet use from any device capable of accessing the internet.
> f) The defendant shall not enter any social network sites or chat rooms without the prior approval of the police or probation service.
> g) The defendant shall not create or use any email account unless he advises the police of all his accounts details, including his email addresses and passwords.
> h) The defendant shall not knowingly go to or remain at any address at which any person under the age of 16 years or vulnerable person resides or visits whilst that child is present at the address.
> i) The defendant shall not reside at any address that is situated within 500 metres of any secondary school with pupils between the ages of 11-16.
> j) The defendant shall not reside at any address that is situated within 500m of any establishment that has regular and organised activities attended by children between the ages of 11-16. These include, but are not limited to, youth organisations such as the scouts and military cadets. The suitability of any such establishment shall be decided by a police officer."

31. In relation to Sexual Harm Prevention Orders generally, we draw attention to the principles as set out in previous decisions of this court in *R v McLellan* [2017] EWCA Crim 1464 and *R v Parsons* [2017] EWCA Crim 2163. Both are decisions over which my Lord, Gross LJ presided.

32. In *McLellan* the court made the following observations at paragraph 25:

> "i) First, there is no requirement of principle that the duration of a Sexual Harm Prevention Order should not exceed the duration of the applicable notification requirements. … it all depends on the

circumstances.

ii) Secondly … a Sexual Harm Prevention Order may be made when the court is satisfied that it is necessary for the purpose of protecting the public or any particular members of the public from sexual harm from the defendant… As with any sentence, a Sexual Harm Prevention Order should not be made for longer than is necessary.

iii) A Sexual Harm Prevention Order should not be made for an indefinite period (rather than a fixed period) unless the court is satisfied of the need to do so. An indefinite Sexual Harm Prevention Order should not be made without careful consideration or as a default option. Ordinarily, as a matter of good practice, a court should explain, however briefly, the justification for making an indefinite Sexual Harm Prevention Order, though there are cases where that justification will be obvious.

iv) All concerned should be alert to the fact that the effect of a Sexual Harm Prevention Order of longer duration than the statutory notification requirements has the effect of extending the operation of those notification requirements: an indefinite Sexual Harm Prevention Order will result in indefinite notification requirements… Notification requirements have real, practical consequences for those subject to them; inadvertent extension is to be avoided."

33. In *Parsons* this court underlined the following at paragraph 5 of the judgment:

"i) First, as with Sexual Offences Prevention Orders, no order should be made by way of a Sexual Harm Prevention Order unless *necessary* to protect the public from sexual harm as set out in the statutory language. If an order is necessary, then the prohibitions imposed must be *effective*; if not, the statutory purpose will not be achieved.

ii) Secondly and equally, any Sexual Harm Prevention Order prohibitions imposed must be *clear* and *realistic*. They must be readily capable of simple compliance and enforcement. It is to be remembered that breach of a prohibition constitutes a criminal offence punishable by imprisonment.

iii) Thirdly, … none of the Sexual Harm Prevention Order terms must be oppressive and, overall, the terms must be proportionate.

iv) Fourthly, any Sexual Harm Prevention Order must be tailored to the facts. There is no one size that fits all factual circumstances."

34. Bearing these points and principles in mind, we consider that there is force in some of the criticisms made by Mr Smyth of the Sexual Harm Prevention Order made in this case. Taking account of those criticisms, and accepting or rejecting them as appropriate, we substitute the Sexual Harm Prevention Order which has been circulated in advance of this judgment and which now reads as follows:

> "(a) The appellant shall not allow any female under the age of 16 years who is not a relative to enter and/or remain at his place of dwelling being the address at which the appellant resides unless the parent or legal guardian of that child is aware of the appellant's previous convictions and is present at all times.
>
> (b) The appellant shall not undertake any activity or employment (either voluntary or paid) where a female under the age of 16 years is also engaged in that activity or employment.
>
> (c) The appellant shall not use any device capable of accessing the internet unless (i) it has the capacity to retain and display the history of internet use and (ii) he makes the device available for inspection on request by a police officer.
>
> (d) The appellant is prohibited from deleting the history of internet use from any device capable of accessing the internet.
>
> (e) The appellant shall not enter any chat room without the prior approval of the police or Probation Service.
>
> (f) The appellant shall not create or use any email account unless he advises the police of all his accounts' details, including his email addresses and passwords.
>
> (g) The appellant shall not knowingly go to or remain at any residential address at which any female under the age of 16 years resides or visits whilst that child is present at the address unless the parent or legal guardian of that child is aware of the appellant's previous convictions and is present at all times."

34. The Sexual Harm Prevention Order will be for a period of fifteen years. The custodial term which the appellant will serve will be between seven and eight years and therefore the Sexual Harm Prevention Order will be effective for between seven and eight years after his release from his sentence of imprisonment and we consider that to be proportionate, given the age at which he will be released.

35. The restraining order shall remain in effect indefinitely, as imposed in the court below.

36. This appeal is accordingly allowed as we have indicated.
